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# EMPLOYING MIGRANT AGRICULTURAL WORKERS: OVERCOMING THE CHALLENGE OF COMPLYING WITH EMPLOYMENT LAWS

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## I. INTRODUCTION

Despite increased use of technology in agriculture, farmers still rely on agricultural workers to perform hand labor in fields. Many of these laborers in the Red River Valley of North Dakota and Minnesota are migrant agricultural workers—hired to thin and weed sugar beets.<sup>1</sup> The relationships that arise are often beset by problems unique to this type of employment. Factors making this relationship unique include the seasonal or temporary nature of the employment,<sup>2</sup> the transitory nature of many of the employees, language and custom differences between employers and employees, and the unequal negotiating position between employer and employee that generally results from these factors. Because these factors increase the complexity of the employment relationship, compliance with certain employment laws is difficult.

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1. "'Migrant agricultural workers' [hereinafter migrant workers] means individuals who are employed in agricultural employment of a seasonal or other temporary nature, and who are required to be absent overnight from [their] permanent place of residence." 29 U.S.C. § 1802(8)(A) (1988). For purposes of this article, migrant agricultural workers fall within the above definition and perform field work related to planting, cultivating, or harvesting operations in the Red River Valley.

2. Because migrant farm workers in the Red River Valley are rarely independent contractors, this article assumes that all migrant farm workers are employees. For a discussion of different treatments and status of migrant workers, see Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213, 220 (1990); Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455 (1991).

This article identifies some of the unique problems resulting from migrant employment relationships and the difficulty in complying with federal and state employment laws.

The article begins by explaining the conflicts among the jurisdictions including conflicts between federal laws, conflicts between federal and state laws, and interstate conflicts that affect employers and employees who operate or work in more than one state. Second, this article identifies unclear or problematic requirements that affect both employers and employees. Third, this article discusses issues not yet resolved by rules or regulations. In each section, the authors recommend solutions when possible.

## II. CONFLICT AMONG JURISDICTIONS

Various federal and state agencies are responsible for enforcing different aspects of an employment relationship. Agricultural employers are regulated both by the federal government and its agencies and by the state or states in which the employers farm.<sup>3</sup> Certain exemptions from the federal and state requirements exist for those employers who employ small agricultural workforces.<sup>4</sup> Problems arise when the exemptions or the requirements for compliance between the various federal and state regulations are similar but not identical. These different federal and state requirements force employers to look at numerous factors in an effort to determine whether they are subject to the regulatory scheme. If employers discover that they are subject to state and federal regulation, the procedures they must follow may be similar but not identical. Some perceive these requirements as more complicated than necessary to reach the social goals envisioned by the legislation. The following discussion presents several examples of this difficulty.

### A. MINIMUM WAGES

The federal government, Minnesota and North Dakota all have established minimum wage guidelines.<sup>5</sup> North Dakota's min-

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3. See, e.g., 29 U.S.C. § 212 (1988); MINN. STAT. § 181A.04 (Supp. 1993); N.D. CENT. CODE § 34-07-01 (1987) (providing minimum ages for child labor).

4. See Fair Labor Standards Act, 29 U.S.C. § 213(a)(6)(A) (1988) (exempting employees who did not work for more than 500 man-days during the preceding year) [hereinafter FLSA]; Federal Unemployment Tax Act, 26 U.S.C. § 3306(a)(2) (1988); 29 C.F.R. § 1904.15 (1992) (Occupational Safety and Health Administration's injury and illness record-keeping requirements). See *infra* note 41 for a definition of "man-day."

5. 29 U.S.C. § 206 (1988 & Supp. III 1991); N.D. ADMIN. CODE § 46-02-05-02 (1991); MINN. STAT. § 181.87(3) (Supp. 1993).

imum wage provisions apply to *all* employees, while the federal minimum wage regulations contain various exemptions for certain employers, which may exclude some farmers.<sup>6</sup> Although one may initially assume that federal law preempts state law, thereby relieving some North Dakota farm employers from having to pay minimum wage, that is not always the case with respect to employment law. Generally, differences between federal and state employment laws are resolved by requiring the employer to comply with the legal mandate that provides the employee with the greater protection or benefit, unless state law directly conflicts with federal law.<sup>7</sup> As a result, all North Dakota farm employers must pay their employees minimum wage, even though some fall within the federal exemption. For employers who are required to pay minimum wage under both federal and North Dakota law, confusion is minimal since the two jurisdictions impose identical minimum hourly wage.<sup>8</sup>

Minnesota farm employers face a somewhat more complicated situation. Although all employers are required to pay a minimum wage, the hourly rate varies depending on the employer's annual volume of gross sales.<sup>9</sup> For "large employers"—those whose annual gross sales exceed \$362,500—the minimum hourly wage rate is presently \$4.25, the same as the federal minimum wage.<sup>10</sup> For "small employers"—those whose annual gross sales are \$362,500 or less—the minimum hourly wage rate is presently \$4.00.<sup>11</sup> Thus, employers in Minnesota must monitor additional employment information which may allow them to qualify for an exemption under federal law and pay their employees a lower minimum wage rate under Minnesota law.

The minimum wage compliance issue is further complicated when an employer operates in more than one state. Employers

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6. See 29 U.S.C. § 213(a)(6)(A)-(D) (1988) (providing, for example, that the federal minimum wage provisions do not apply to an "employee employed in agriculture . . . if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor"). See *infra* note 41 for a definition of "man-day."

7. See, e.g., 29 U.S.C. § 218(a) (1988) (providing in part that the Fair Labor Standards Act minimum wage requirements are not intended to excuse compliance with state or federal law that establish a higher minimum wage); 29 C.F.R. § 570.25 (1992) (providing in part that federal law is not to be construed to permit noncompliance with any state law establishing a higher standard); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1273 (1st Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3698 (U.S. Apr. 1, 1993) (providing that state laws "interfering with or contrary to" federal laws may be subject to federal preemption).

8. 29 U.S.C. § 206(a)(1) (Supp. III 1991); N.D. ADMIN. CODE § 46-02-05-02 (1991).

9. MINN. STAT. § 177.24 (Supp. 1993).

10. MINN. STAT. § 177.24(1)-(2)(b) (Supp. 1993).

11. *Id.*

whose farm business operates in both Minnesota and North Dakota must determine which state law is applicable. North Dakota's minimum wage law applies to employers who employ workers within the state.<sup>12</sup> The Minnesota minimum wage law does not specifically identify to whom the law applies aside from the "large employer"/"small employer" classifications discussed above.<sup>13</sup> However, the powers and duties of the Commissioner of Labor under the Minnesota Fair Labor Standards Act, which includes the minimum wage provision, include supervision over "employers of employees working in the state."<sup>14</sup> This provision may mean that any employment in either state, regardless of the employer's principal place of business, will subject the employer to the laws of the state in which the employee is working. As a result, employers who pay minimum wage have to establish a procedure for tracking how much time each employee spends working in each state, and employers need to determine the circumstances under which each state's laws apply.

The Minnesota sales-based minimum wage further complicates the situation. For example, some agricultural employers primarily operate in North Dakota, but also own land in Minnesota. If the employers must comply with Minnesota's minimum wage law when employees work in Minnesota, the employers may have difficulty determining whether they are a "small" or "large" employer under Minnesota law when most of the commodity is grown outside the state. This quandary should be settled so that employers whose employees work in bordering states know the circumstances under which each state's laws will apply.

Similarly, workers' compensation and state income tax withholding laws can be burdensome for employers who operate in both Minnesota and North Dakota. On one hand, North Dakota does not require employers to pay workers' compensation for agricultural employees nor does the state require agricultural employers to withhold state income tax.<sup>15</sup> Minnesota, by contrast, mandates that certain farm employers pay workers' compensation or acquire liability insurance to protect their workers.<sup>16</sup> In addition, Minnesota state income taxes generally must be withheld

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12. N.D. CENT. CODE § 34-06-05(3) (1987).

13. MINN. STAT. § 177.24 (Supp. 1993).

14. MINN. STAT. § 177.27 (Supp. 1993).

15. N.D. CENT. CODE § 65-01-02(21) (Supp. 1991); N.D. CENT. CODE § 57-38-60(7) (Supp. 1991).

16. See MINN. STAT. § 176.021 (Supp. 1993) (providing that employers are liable for workers' compensation coverage); see also MINN. STAT. § 176.011(11a) (Supp. 1993) (providing exemption for family farms that pay less than \$8,000 in annual wages or less than

from an employee's pay.<sup>17</sup> These interstate differences are most burdensome for farmers and employees who operate their business or work in both states.

Recommendations for more consistent legislation among the various legislating bodies may be unrealistic but warrant analysis. For example, while the North Dakota Legislature has often provided exemptions for agricultural employers in other contexts,<sup>18</sup> it has chosen not to include an exemption for employers under the minimum wage law.<sup>19</sup> Such an exemption would make the North Dakota law consistent with federal law and bring the state's minimum wage law into conformity with its other exemptions.

Similarly, the Minnesota minimum wage law providing that "small" employers need only pay a \$4.00 minimum wage is inconsistent with federal minimum wage law.<sup>20</sup> However, since the federal minimum wage for non-exempt employers is higher, the Minnesota small employer exemption is available only if the employer is exempt from the federal minimum wage. If the Minnesota minimum wage rates were amended to conform with federal law, employer confusion regarding wages would decrease. This revision would ease the difficulty of compliance for employers and thus would benefit employers, employees, and enforcement agencies. For example, the Minnesota minimum wage statute could provide that agricultural employers who are otherwise exempt from paying the federal minimum wage are required to pay no less than \$4.25 per hour if their gross sales exceed \$362,500; all other agricultural employers exempt from having to pay the federal minimum wage must pay no less than \$4.00 per hour. Such a statement would explicitly recognize the Minnesota statute's interrelationship with federal law.

## B. CHILD LABOR LAW

The federal government, Minnesota, and North Dakota all have laws governing child labor.<sup>21</sup> Unless the state law establishes

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the statewide average wages and have a farm liability insurance policy providing minimum coverage).

17. MINN. STAT. § 290.92(2a)(1) (Supp. 1993).

18. See N.D. CENT. CODE § 65-01-02(21)(a) (Supp. 1991) (providing that agricultural labor is not "hazardous employment" for the purposes of workers' compensation and is therefore exempt from workers' compensation laws); see also N.D. CENT. CODE § 57-38-60(7) (Supp. 1991) (providing that agricultural employers are exempt from withholding state taxes from employees' wages).

19. N.D. ADMIN. CODE § 46-02-05-02 (1991).

20. See MINN. STAT. § 177.24(2)(b) (Supp. 1993).

21. 29 U.S.C. § 212 (1988); MINN. STAT. § 181A.04(1) (Supp. 1993); N.D. CENT. CODE § 34-07-01 (1987).

higher standards, federal child labor law applies to employers despite the enactment of state child labor laws.<sup>22</sup> Because federal child labor law is generally more protective than North Dakota law,<sup>23</sup> North Dakota employers must comply with the federal provisions.<sup>24</sup> Conversely, some Minnesota provisions are more protective than the federal provisions.<sup>25</sup> In such instances, employers must comply with the laws that give the greater protection. Thus, they cannot assume one law controls. Instead, they must be aware of which laws provide the most protection.

Differences between state and federal law in child labor hour and age limitations can be a problem when employers are unaware of or unable to decipher the dual requirements. Employers often express their concern over such duplicity and question whether federal and state requirements can be consistent since the purpose for adopting the statutes were similar.<sup>26</sup> While in some situations state laws may have to be fashioned differently, most states could adopt requirements which are the same as federal provisions, thereby enhancing compliance and diminishing confusion. Since federal laws are intended as a minimum threshold for child labor regulation,<sup>27</sup> states could eliminate most confusion by adopting at least that threshold standard and only deviating from that standard if it desires to establish a higher standard. Such a change would increase uniformity and minimize employer confusion.

### C. EMPLOYMENT STATEMENTS

Federal regulations require that non-exempt employers provide an employment statement to newly-hired employees which

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22. 29 C.F.R. § 570.25 (1992).

23. See N.D. CENT. CODE § 34-07-01 (1993) (allowing children under fourteen to work on a farm if they are supervised by a parent or guardian).

24. See, e.g., 29 C.F.R. § 570.2(b)(1990) (providing in part that minimum age for employment is sixteen if school is in session); N.D. CENT. CODE § 34-07-01 (1987) (providing in part that minimum age for employment is fourteen if school is in session).

25. See, e.g., 29 C.F.R. § 570.2(b) (1992) (providing in part that minimum age for employment is sixteen if occupation is hazardous); MINN. STAT. § 181A.04(5) (Supp. 1993); MINN. STAT. 181A.09(2) (Supp. 1993) (providing that minimum age for employment is eighteen if occupation is hazardous).

26. See, e.g., 29 U.S.C. § 202 (1988) (stating policy of Fair Labor Standards Act is to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers . . ."); see also MINN. STAT. § 181A.02 (Supp. 1993) (stating that "[w]ork . . . must be coordinated with schooling and safety considerations in order to serve best interests of young."); N.D. CENT. CODE § 34-07-20 (1987) (stating that the labor commissioner has the power to "prohibit the employment of minors . . . in any employment . . . which is dangerous or prejudicial to the life, health, safety, or welfare of such minors.").

27. 29 C.F.R. § 570.25 (1992).

details the employment relationship.<sup>28</sup> The State of Minnesota requires a similar statement from non-exempt employers, but Minnesota's statement requires different information.<sup>29</sup> North Dakota does not have a comparable requirement. Thus, North Dakota growers must comply with the federal law concerning employment statements unless they are exempt under federal law.<sup>30</sup>

Several compliance problems exist for Minnesota employers in the context of employment statements. For example, the statute applies specifically to employers who recruit migrant workers.<sup>31</sup> "Employer" is defined in pertinent part as "a processor of fruits or vegetables that employs . . . more than 30 migrant workers per day . . . ."<sup>32</sup> Because neither statute<sup>33</sup> nor Minnesota case law has defined "processor," it is unclear whether an employer who hires a migrant worker to hoe a field falls within the definition of "a processor of fruits or vegetables." Therefore, Minnesota agricultural employers of migrant workers are uncertain whether to provide an employment statement to their employees.

Adding to the confusion, section 181.86 of the Minnesota Statutes provides that the employment statement becomes an enforceable contract between the employer and the employee.<sup>34</sup> In contrast, the federal employment statement does not create an enforceable contract.<sup>35</sup> Thus, Minnesota employers who provide an employment statement when they are unsure about whether

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28. See 29 U.S.C. § 1821(a)(1)-(7) (1988) (providing that at the time of employment, the migrant worker will be given written information on "the place of employment; . . . the wage rates to be paid; . . . the crops and kinds of activities on which the worker may be employed; . . . the period of employment; . . . the transportation, housing, and any other employee benefit to be provided, if any and any costs to be charged for each of them; . . . the existence of any strike or other concerted work stoppage, . . . at the place of employment; and . . . the existence of any arrangements with any owner or agent of any establishment in the area of employment under which . . . , the agricultural employer, . . . is to receive a commission or any other benefit resulting from any sales by such establishment to the workers."); see also 29 U.S.C. § 1831(a)(1)(A)-(C) (1988) (applying the same provisions to seasonal agricultural workers when offered employment).

29. See MINN. STAT. § 181.86(1) (Supp. 1993) (providing that the terms of the employment statement must be in writing and shall include "[t]he date on which and the place at which the statement was completed and provided to the migrant worker; . . . [t]he name and permanent address of the migrant worker, of the employer, and of the recruiter . . . ; . . . [t]he date on which the migrant worker is to arrive at the place of employment, the date on which employment is to begin, the approximate hours of employment, and the minimum period of employment; . . . [t]he crops and the operations on which the migrant worker will be employed; . . . [t]he wage rates to be paid; . . . the payment terms . . . ; . . . [a]ny deductions to be made from wages; and . . . whether housing will be provided.").

30. See 29 U.S.C. § 1803 (1985) (providing examples of family business exemptions, small business exemptions, and other exemptions).

31. MINN. STAT. § 181.85(3)-(6) (Supp. 1993).

32. MINN. STAT. § 181.85(4) (Supp. 1993).

33. See generally MINN. STAT. § 181.85 (Supp. 1993).

34. MINN. STAT. § 181.86(2) (Supp. 1993).

35. See 29 U.S.C. § 1821(a)(1)-(7) (1988); 29 U.S.C. § 1831(a)(1)(A)-(C) (1988).



they need to comply with the employment statement requirements are creating contractual relationships with their employees.

Exempt employers of field workers may want to avoid creating a contract such as the one formed by a Minnesota employment statement because it is extremely difficult to estimate the hours of employment and the minimum employment periods required by the statement.<sup>36</sup> The difficulty arises because the length of employment depends on such uncontrollable factors as employee efficiency, weather conditions, and effectiveness of agronomic practices.

If section 181.86 of the Minnesota Statutes was clarified, employers could more effectively comply with the statute—thus, benefiting both employers and employees. For example, simplified compliance would allow employees to receive the benefits the legislation was meant to convey, and agencies would not have to take as much action to enforce these laws. Further, if the Minnesota employment statement is intended to reach employers of field labor, such as sugar beet farmers, requirements that more closely resemble the federal requirements may increase an employer's willingness to comply, regardless of the state in which he or she operates.

Another difficulty with employment statements is that Minnesota and North Dakota laws addressing discharge of employees might vary if a grower specifies an end of work-date. A decision regarding the stop date is complicated by the existence of the employment at-will doctrine, which gives an employer the right to terminate the employee without cause under certain circumstances.<sup>37</sup> This issue, however, is beyond the scope of this article.

#### D. EXEMPTIONS FROM FEDERAL AND STATE LAW

Employer confusion over state and federal regulations is exacerbated not only when several jurisdictions impose different requirements in regulating the same issue, but also when regulations of several agencies have different requirements despite a

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36. MINN. STAT. § 181.86(1)(3) (Supp. 1993).

37. See N.D. CENT. CODE § 34-03-01 (1987) (providing that if "no specified term" is given in the terms of employment, after notice to the other party, either party may terminate the relationship at-will); *Harris v. Mardan Business Systems, Inc.*, 421 N.W.2d 350, 354 (Minn. Ct. App. 1988) (recognizing the right of an employer to terminate an employee at any time, with or without cause, if the employee is hired for an indefinite term). Because the law in both North Dakota and Minnesota is silent on the issue of what happens to at-will termination if a stop date is given for migrant farmworker agreements, it will remain an open question until the courts or the state legislatures address the issue.

perceived similar intent.<sup>38</sup> For example, several state and federal regulations provide various exemptions for small employers.<sup>39</sup> Yet, the exemptions differ among regulations, so that an employer who is exempt from one regulation may not be exempt from another regulation. To illustrate this problem, consider the Fair Labor Standards Act (FLSA), which establishes in part federal minimum wage requirements but offers several exemptions.<sup>40</sup> The primary exemption under which employers generally fall is the 500 "man-days" test, which exempts those employers who employ less than 500 man-days of agricultural labor each calendar quarter during the preceding calendar year.<sup>41</sup> Likewise, the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), which establishes requirements for employers of migrant and seasonal workers, provides a similar 500 man-days exemption.<sup>42</sup> However, under the Federal Unemployment Tax Act (FUTA), employers who have paid less than \$20,000 in wages or employed less than ten employees during the current or preceding calendar year may be exempt from deducting and submitting unemployment taxes.<sup>43</sup> On the other hand, the Occupational Safety and Health Administration's (OSHA) injury and illness record-keeping requirements exempt small employers with less than ten employees.<sup>44</sup>

The problem with these types of exemptions is not that they are allowed but that they are inconsistent. Generally, these exemptions have the same purpose—to aid small businesses.<sup>45</sup>

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38. For other points of view on the intent of labor legislation exemptions, see Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987) (arguing federal migrant employment law is discriminatory); Glader, *supra* note 2, at 1460 (discussing the "myth" that agriculture is a unique industry requiring special federal employment law exemptions).

39. See 29 U.S.C. § 213(a)(6)(A) (1988) (establishing exemption from the Fair Labor Standards Act for agricultural employers); see also 29 U.S.C. § 1803(a)(2) (1988) (establishing exemptions from the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1988) [hereinafter MSAWPA], and the Federal Unemployment Tax Act, 26 U.S.C. § 3302 (1988) [hereinafter FUTA] for agricultural employers, and exemption from the Occupational Safety and Health Administration's [hereinafter OSHA] record-keeping requirements in the areas of injury and illness); N.D. CENT. CODE § 65-01-02(21)(a) (Supp. 1991); N.D. CENT. CODE § 57-38-60(7) (Supp. 1991) (exempting agricultural labor from workers' compensation laws and state tax withholding laws, respectively); MINN. STAT. § 177.24(2)(b) (Supp. 1993) (exempting "small" employers from \$4.25 minimum wage provision which could cover agricultural employers).

40. 29 U.S.C. § 213 (1988) (providing FLSA exemptions).

41. 29 U.S.C. § 213(a)(6)(A) (1988). "Man-day" means "any day during which an employee performs any agricultural labor for not less than one hour." 29 U.S.C. § 203(u) (1988). Man-days are used as a basis for exemption from the FLSA and the MSAWPA. 29 U.S.C. § 213(a)(6)(A) (1988); 29 U.S.C. § 1803(a)(2) (1988).

42. 29 U.S.C. § 1803(a)(2) (1988).

43. 26 U.S.C. § 3306(a)(2) (1988).

44. 29 C.F.R. § 1904.15 (1992).

45. The FLSA 500 man-day exemption was "intended to provide protection to the employees of large agribusiness enterprises." S. REP. NO. 1487, 89th Cong., 2d Sess. 2

Thus, small employers often question why these provisions which were intended to benefit the small employer cannot be made uniform to simplify determination of applicability. To identify the most reasonable exemption standard for achieving the intent of the legislation, assume that 500 man-days equal seven full-time workers working for thirteen weeks (5.5 days per week x 13 weeks x 7 workers = 501 man-days). Five hundred man-days can approximate \$19,000 in wages (500 man-days x 9 hours per day x \$4.25 minimum wage). The seven worker hypothetical assumed in both of these calculations is fairly close to the ten worker threshold established for OSHA application.<sup>46</sup> Given these assumptions, it appears that a uniform exemption may be feasible for at least the federal regulations applicable to agricultural employers.

The implications of a single exemption threshold vary. If the exemption is based on man-days per calendar quarter, an employer with only a few highly-paid employees would not trigger the current FUTA threshold. Likewise, employers who use a large crew for one or two weeks would probably not reach the FLSA and MSAWPA 500 man-days threshold, but they would not be exempt from the OSHA requirements. Finally, employers who use a less-than-ten-person crew for only a few hours each day would probably exceed 500 man-days; however, they would probably not exceed the FUTA requirements because wages would be less than \$20,000.

A single exemption based on the number of workers employed during a calendar period may be one with which employers could most easily comply. For example, allowing an exemption for employers who employ less than ten employees during a calendar year would be relatively straightforward. On the other hand, a composite threshold may capture the essence of all of these exemptions and at least unify them to simplify determi-

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(1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3011. The same exemption adopted under MSAWPA, in conformity with the FLSA, was intended "to reach the true small business." H. REP. NO. 885, 97th Cong., 2d Sess. 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4556. Congress' intent in granting the exemptions under FUTA is not clearly set forth, but legislative history indicates that the Senate originally intended that the federal unemployment law should not apply to agricultural employers. H. CONF. REP. NO. 1745, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6032, 6033. In conference, however, the House bill established an exemption for agricultural employers based on the amount of wages paid. This exemption was expanded and finally adopted by both houses of Congress. *Id.* The conference committee compromise, from the Senate version exempting agricultural employers entirely to an expanded House version, indicates a legislative intent to minimally impact small businesses. Finally, the OSHA exemption, originally included in appropriation authorizations, did not indicate a purpose other than to continue the congressional intent of exempting "small employers." 42 FED. REG. 38,568 (1977).

46. 29 C.F.R. § 1904.15 (1992).

nation of regulation applicability. For example, if any one of the following thresholds is exceeded, an employer would not be exempt from FLSA, MSAWPA, FUTA, or OSHA requirements: (1) more than 500 man-days are employed in any calendar quarter of the current or preceding calendar year; (2) more than \$20,000 is paid in wages during any calendar quarter in the current or preceding calendar year; or (3) if ten or more employees are employed at any one time during the current or preceding calendar year.

Regardless of whether the exemption is based on a single factor or many factors, a uniform exemption would reduce the complexity of determining which regulations apply. Further, uniformity would ease enforcement problems among administrative agencies because of less confusion among employers. Finally, reduced employer confusion would benefit the intended beneficiaries of these requirements—the employees—because employers who are not exempt would know they need to fulfill their legal requirements.

### III. UNCLEAR OR PROBLEMATIC REQUIREMENTS

Another challenge for growers and migrant workers is complying with unclear or problematic legislative mandates. This difficulty, unlike those described in section II, is not due to conflicts among the jurisdictions or regulatory schemes. These problems are caused by requirements mandating that employers and employees take action not easily accomplished or provide information not easily obtained.

#### A. END-OF-SEASON PAY AND EMPLOYEE ELIGIBILITY FOR PUBLIC ASSISTANCE

One challenge for growers and migrant workers is presented by the interrelationship between the frequency in which workers are paid and their eligibility for public assistance.

##### 1. *Frequency of Pay*

State frequency of pay laws generally require employers to pay employees according to minimum pay periods.<sup>47</sup> Despite these frequency of pay laws, agricultural employers have tradition-

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47. See MINN. STAT. § 181.101 (Supp. 1993) (providing employees are to be paid every thirty days); see also N.D. CENT. CODE § 34-14-02 (Supp. 1991) (providing that "[e]very employer shall pay all wages due to his employees at least twice each calendar month, or on regular agreed paydays designated in advance by the employer . . .").

ally paid migrant workers on a one-time basis—usually at the end of the season. Although section 181.101 of the Minnesota Statutes does not specifically exempt migrant workers from the frequency of pay law, application of this law to such employees apparently has not been enforced. This is evidenced by section 181.101 of the Minnesota Statutes, which was recently amended to include application to “agricultural labor,” defined as “field labor associated with the cultivation and harvest of fruits and vegetables . . . .”<sup>48</sup>

Relying on the “regular agreed paydays” language of its frequency of pay statute,<sup>49</sup> North Dakota employers and their employees have opted out of the necessity of paying wages at least twice a month. Generally, both employers and employees have desired a one-time end of the season payroll. Employers have used this pay practice because of the convenience and economy of this type of payment. Some employees request a single payroll because it allows the employer to function as a depository and because it reduces the frustration of estimating pay for intermediate periods, which may enhance eligibility for public benefits.

As a result of these advantages, frequency of pay laws, which apply to most other employment relationships, have been avoided in the farmer-migrant worker relationship. When both the employer and employee desire a single-payment relationship, neither party is harmed. However, as explained in the following section, social service agencies have difficulty determining eligibility for public assistance.<sup>50</sup> Social service agencies cannot accurately determine eligibility for public assistance during the summer months because the workers do not have any income to report until the job is complete and therefore are eligible for public assistance from the time they begin work until the day they are paid.

The revised Minnesota wage payment statute<sup>51</sup> amended the

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48. MINN. STAT. § 181.85(2) (Supp. 1993).

49. N.D. CENT. CODE § 34-14-02 (Supp. 1991).

50. See *infra* notes 53 to 61 and accompanying text. *Legislation Clears Up Migrant Pay Confusion*, FARGO FORUM, Mar. 21, 1993, at D2 (suggesting that the new Minnesota legislation would put an end to social service costs which result from Red River Valley migrant workers each summer). If a grower and migrant workers agree to infrequent payrolls to help migrant workers receive more public assistance, both could be charged with welfare fraud. See, e.g., MINN. STAT. § 256.98(1), (5) (Supp. 1993) (providing that anyone who obtains, aids or abets another for the purpose of receiving more public assistance than he or she is entitled, whether by false statement, representation or intentional concealment, can be prosecuted civilly or criminally). Persons wrongfully helping themselves or another to obtain more assistance than entitled can lose public assistance eligibility from six months to permanently. MINN. STAT. § 256.98(1)-(8) (Supp. 1993).

51. MINN. STAT. § 181.101 (Supp. 1993).

present frequency of pay statute to require wages be paid to all employees, including migrant workers, at least every thirty days.<sup>52</sup> Consequently, the new provision establishes a definite pay period and will assist social service agencies in determining applicant eligibility for public assistance.

The North Dakota legislature has not formally proposed such an amendment to section 34-14-02 of the North Dakota Century Code. Thus, as long as the statute contains language allowing employers and employees to agree upon frequency of pay, definite pay periods will remain a province of the employer and employee despite the problems it creates for social service agencies.

## 2. *Projecting a Migrant Worker's Future Income with Reasonable Certainty*

Problems in determining eligibility for public assistance<sup>53</sup> arise when state or federal agencies solicit information from employers to determine whether a migrant worker may receive public assistance. To be eligible for public assistance, the income of an individual or family generally must be below a specified dollar amount.<sup>54</sup> To confirm or verify income information provided by an applicant, agency personnel ask employers to report how much they pay the applicant.<sup>55</sup> The general rule is that employers

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52. *Id.*

53. For the purposes of this paper, "public assistance" refers to any federal or state welfare program. "Public assistance" can have different meanings in federal law. *See, e.g.*, 7 C.F.R. § 271.2 (1992) ("public assistance" in the food stamp programs "means any of the following programs authorized by the Social Security Act of 1935, as amended: Old-age assistance, aid to families with dependent children . . . , aid to the blind, aid to the permanently and totally disabled and aid to aged, blind or disabled.")

54. Generally, eligibility for public assistance depends on an applicant's available resources and income. The exact allowable amounts vary from year to year and between assistance programs. For example, in the Special Supplemental Food Program for Women, Infants, and Children, applicants must fall below income levels based on state guidelines, which in turn are based on "the income guidelines established under section nine of the National School Lunch Act for reduced-price school meals or identical to State or local guidelines for free or reduced-price health care." 7 C.F.R. § 246.7(c)(1) (1992).

55. *See, e.g.*, 7 C.F.R. § 273.2(f)(2)(i) (1992). State agencies are allowed by federal law to verify "questionable" information from an applicant affecting "eligibility and benefit level." *Id.* However, while state agencies must have guidelines to determine what information is questionable, they cannot "prescribe verification based on race, religion, . . . [and] shall not target groups such as migrant farmworkers or American Indians for more intensive verification . . . ." *Id.* Therefore, a state may be forbidden to verify the income of a migrant worker unless it similarly verifies all other public assistance applicants to avoid a targeting challenge.

Federal regulations require states to use "joint processing" for the various federal public assistance programs, such as food stamps, and state public assistance, such as General Assistance. 7 C.F.R. § 273.2(j)(2) (1992). Thus, although criteria discussed in this section such as income calculations and the "reasonable certainty" language come from food stamp regulations, the criteria are applicable for most public assistance. *Id.* Further distinctions among public assistance programs are beyond the scope of this article.

report wages paid—retrospective budgeting.<sup>56</sup> However, there is an exception for employers of migrant workers. Because federal law recognizes that migrant incomes fluctuate, employers must report future wages instead of wages already paid.<sup>57</sup> This is known as prospective budgeting.<sup>58</sup>

Regulations require that employers indicate the amount that the employee will receive with “reasonable certainty.”<sup>59</sup> However, growers are often uncertain of the amount to report because they are not sure how much they will actually pay their employees. For example, in the Red River Valley, many growers hire migrant workers at the end of May for work that may not begin until mid-June or late-June. Thus, the grower must try to estimate wages for work performed three or more weeks into the future. The uncertainty is due in part to doubt about whether the laborer’s services will be needed. Rain, hail, floods, insect invasions, and falling crop prices can make migrant workers unnecessary. Such common vagaries of farming can make an employer’s long term wage estimate completely inaccurate. Requiring employers to report past wages rather than prospective earnings can help to reduce this uncertainty. Even though retrospective budgeting creates other problems, such as income miscalculations and improper assistance allotments,<sup>60</sup> employers of migrant laborers would be subject to the same expectations and challenges of any other employer.

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56. *See, e.g.*, 7 C.F.R. § 273.10(c)(1)(ii) (1992) (directing states to use income from the past thirty days “as an indicator of the income that is and will be available to the household during the certification period”); 7 C.F.R. § 273.10(c)(3)(i) (1992) (allowing applicants “to elect to have income averaged” using past income information); *see also* Monthly Reporting and Retrospective Budgeting, 7 C.F.R. § 273.21(a) (1992) (providing a retrospective budgeting system to determine the eligibility and benefits of a household); Monthly Reporting/Retrospective Accounting, 7 C.F.R. § 282.17(c)(3)(i) (1992) (providing that migrant farmworkers are not covered by monthly reporting and retrospective accounting while in the migrant stream).

The certification period refers to the period the applicant is eligible for authorization to receive public assistance. *See, e.g.*, 7 U.S.C. § 2012(c) (1988) (defining certification period for the food stamp program).

57. *See, e.g.*, 7 C.F.R. § 273.10(c)(1)(ii) (1992) (discussing dangers of income averaging for income that fluctuates seasonally).

58. *See* 7 C.F.R. § 273.10 (c)(3)(ii) (1992) (providing for projected average incomes when income fluctuations are anticipated); *see also* 7 C.F.R. § 273.21(b)(1) (1992); 7 C.F.R. § 282.17(c)(3)(i) (1992) (excluding migrants from retrospective budgeting programs).

59. 7 C.F.R. § 273.10(c)(1)(ii) (1992).

60. For example, a migrant family may have earned wages previously but may have no funds for food or shelter. If retrospective budgeting were used in this case, the family may not qualify for assistance although they need it. Conversely, if a family had no previous income but was soon to begin employment, the use of retrospective budgeting may allow them to qualify for aid although they did not need it. Thus, retrospective budgeting, whether allowed by federal law or electable by a migrant applicant, would not solve all the problems of income miscalculations and improper assistance allotments.

A second factor reducing the accuracy of future wage estimates is the practice of many employers to delay paying their migrant workers until the job is done. North Dakota and Minnesota both allow growers to pay workers at the end of a job,<sup>61</sup> which usually means that workers are paid once, at the end of the season. A worker could be hired in May but may not begin working until June and may not be paid until August, a common situation in the Red River Valley. This leaves the workers unable to spend their earned income during the two to three months that they are working. Theoretically, migrant workers are then unable to report an income for June and July, thereby increasing their chances of qualifying for public assistance.

3. *Social and Economic Concerns Resulting from Reasonable Certainty and Frequency of Pay Requirements*

Social and economic concerns arise from both "reasonable certainty" and frequency of pay requirements. Workers paid at the end of the job may qualify to receive public assistance even though they are working, but if they were paid more frequently, they may not qualify for public assistance. Equally important, growers essentially receive a subsidy since a worker receiving sufficient public assistance is unlikely to ask for a wage advance or more frequent pay. Consequently, this allows the grower to retain the use of the migrant worker's wages, thus effectively subsidizing growers.

The following scenarios illustrate the problems faced in trying to reassess these frequency of pay and reasonable certainty regulations. For example, if growers in early June estimate what they expect to pay in August, the state social service agency may divide the estimate among the months of June, July, and August, and attribute a monthly income to the migrant worker. This calculation may prevent the migrant worker from receiving public assistance, even though the worker does not receive income in one of the months.

More frequent pay periods could help ease the problem of miscalculating eligibility and benefits. However, shortening the interval when growers must report wages would conflict with existing federal law. For example, federal food stamp law requires

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61. See *supra* notes 47-52 and accompanying text for a discussion of the frequency of pay laws which allow "end-of-season" pay.



agencies to certify aid in monthly installments.<sup>62</sup> Therefore, to allow growers to report income for a period of less than one month and to allow an agency to calculate benefits from that amount, the federal certification period would need to be shortened. This would be consistent with federal law, which already requires state agencies to respond promptly to any reported change in income affecting eligibility or the proper amount of aid.<sup>63</sup> However, states' "prompt action" on reported changes will only affect future months' public assistance eligibility and not cure current months' miscalculations. Thus, given the normal fluctuations of migrant income, the federal government should allow states to vary assistance on certification periods shorter than one month. In addition, states should tighten their frequency-of-pay laws to increase the opportunity for employers to estimate wages more accurately.<sup>64</sup>

Using a shorter period for paying or reporting future wages would probably reduce miscalculations that result in overpayment or underpayment of aid. More frequent certifications would also tighten the assistance period and allow for a more accurate calculation of income. This might ensure that those migrant workers who need public assistance could receive it, thereby satisfying the public policy of helping those in need.

## B. BILINGUAL REQUIREMENTS

Various federal and state migrant labor reporting requirements provide that employers must give certain information to agricultural employees orally and/or in writing.<sup>65</sup> Because many

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62. 7 C.F.R. § 273.10(f)(1) (1992) (requiring states to certify applicants for a calendar month or an approved fiscal month).

63. *See, e.g.*, 7 C.F.R. § 273.12(c) (1992) (requiring state agencies to "take prompt action on all changes [in the applicant's information] to determine if the changes affect the household's eligibility or allotment").

64. Growers could be reluctant to support shortening the interval for income estimates to social services because increasing the accuracy of the income calculations may remove some migrant workers from public assistance eligibility. However, in Minnesota, grower associations have supported the proposal to tighten frequency of pay laws in order to reduce assistance miscalculations. Telephone conversation with Minnesota Representative, Kevin Goodno (co-sponsor of Minnesota House of Representatives Bill 1151, enacted as MINN. STAT. § 181.101 (Supp. 1993)), Mar. 25, 1993.

A possible ramification of this could be that migrant workers may not be willing to work for the current wages if migrant workers lose their eligibility for public assistance due to more accurate income reporting.

65. *See* 29 U.S.C. § 1821(c) (1988) (requiring housing provided to conspicuously present the terms and conditions of the housing); 29 U.S.C. § 1821(g) (1988) (stating that information must be provided "in English or, as necessary and reasonable, in Spanish or other language common to [migrant agricultural] workers who are not fluent or literate in English"); *see also* MINN. STAT. § 181.86(1) (1992) (stating that written employment information must be provided in English and Spanish); Worker Protection Standard, 57 FED. REG. 38,159 (1992) (to be codified at 40 C.F.R. § 170.120(d)) (stating that when required, oral pesticide warnings must be given in a manner the migrant worker can understand).

migrant laborers are aliens who speak little or no English, a natural extension of these requirements is to provide employment information in the language the employee will understand. For example under federal law, employers are required to provide a written employment statement to employees when they are hired.<sup>66</sup> The United States Department of Labor provides a form that employers can use to comply with this requirement.<sup>67</sup> One column of the form is in English, the other in Spanish.<sup>68</sup> Thus, the law effectively mandates that employers who hire non-English speaking workers be literate in the language of their workers. However, many employers do not know Spanish and are unable to complete the worker information or explain the form orally in Spanish. Thus, although the information form has a Spanish option, the employer generally does not have the ability to successfully complete it.

Even if a grower provides a bilingual statement, problems may arise. For example, the migrant worker may speak a dialect<sup>69</sup> other than that used in the agreement and thus may be functionally illiterate, or the migrant worker may be unable or reluctant to ask for a clarification. In some cases, the employer may be responsible for ensuring that the employee understands all employment terms.<sup>70</sup> Therefore, employers are urged to question an employee on all material terms to ensure that the employee understands the statement.

### C. TEMPORARY HOUSING FOR MIGRANT LABORERS

Employers often provide temporary housing for migrant laborers at or near the work location. In the Red River Valley, this housing is typically older, wooden-frame homes or mobile homes

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66. 29 U.S.C. § 1821(c) (1988); 29 U.S.C. § 1821(g) (1988).

67. United States Department of Labor Form WH-516 (April 1983).

68. *Id.*

69. The majority of valley migrant workers come from the south Texas border area. Most speak a version of "Tex-Mex," a Spanish dialect. A solution to the dialect problem could be to provide an agreement which incorporates any special Tex-Mex employment terms if standard Mexican Spanish is insufficient for full understanding. This, of course, presupposes that the employer understands enough to ascertain if the employee does not understand and that there is no problem with the Tex-Mex dialect which has been incorporated into the document.

70. According to a practicing attorney in the Red River Valley, *see infra* note 96, local courts frequently assume a primarily Spanish-speaking migrant worker has not understood all the terms of an employment agreement in a wage dispute case. Courts may make this assumption for several reasons. If an employee spoke only in Spanish in court, a judge could easily assume the worker does not understand English. If the judge believes that an unequal bargaining position exists between all Spanish-speaking migrant workers and the growers for whom they work due to differences in English facility, the judge could impose on the grower a duty to equalize the relationship by assuring that the worker understands all terms of employment. *See infra* notes 88-96 and accompanying text for a discussion on unequal bargaining positions.

existing at or relocated to the work location. In this area, growers are subject to extensive federal law, as well as some Minnesota and North Dakota state law, regulating employer-provided housing.<sup>71</sup>

Availability of housing has become a problem because of a shortage of rental units and an increased number of migrant workers.<sup>72</sup> Employers often blame the government for burdensome regulations that have made grower-provided housing cost prohibitive.<sup>73</sup> Rather than upgrading housing according to regulations, many growers have stopped providing it.

While finding a solution to migrant housing problems is not easy, joint private and government-funded housing projects are one answer to the problem.<sup>74</sup> One midwest organization, Midwest Farmworker Employment & Training, Incorporated [hereinafter Midwest Farmworker], is using job training programs to alleviate migrant housing shortages.<sup>75</sup> Through this organization, migrant workers are given on-the-job carpentry training while improving farm housing intended for migrant workers. Services are provided free to the trainees; property owners pay for the materials. This type of program results in a win-win solution. Migrant workers are trained in a skill, and migrant housing is brought into compliance with federal and state law at a cost that owners are able to bear. If the goal is to continue to have employer-provided housing at the

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71. See 29 C.F.R. § 500.132 (1992) (providing for housing standards via Employment and Training Administration and Occupational Safety and Health Administration); see also MINN. R. 4630.4800-6550 (1991) (providing for regulation of migrant labor camps); N.D. CENT. CODE § 54-21.3-01-05 (1989 & Supp. 1991) (providing standards for buildings).

72. Marsha Shoemaker, *Crookston Deals with Hot Issue of Housing*, GRAND FORKS HERALD, Aug. 29, 1988, at 1A; Kevin Bonham, *Walsh Housing Shortage Leaves Many Migrant Workers Camped Out in Trucks, Parks*, GRAND FORKS HERALD, June 7, 1989, at 1B; Tracy Shatek, *Grafton Can't House its Migrants*, GRAND FORKS HERALD, June 4, 1992, at 1A.

The housing shortage does not merely create the problem of a migrant family being unable to find housing. Housing shortages may also create health risks when workers overcrowd existing housing, live in substandard housing, or live in unsanitary camps. According to Dr. Ed Zuroweste, Chairman of the Migrant Clinicians Network, migrant farm workers have rising rates of tuberculosis—currently at rates fifty to three hundred times greater than the general public, and parasitic disease rates thirty-five times greater than the United States' average. *Commission on Security and Cooperation in Europe Helsinki Commission: Safety of Migrant Farm Workers* (CSPAN television broadcast Oct. 9, 1992). Both diseases are directly related to substandard and overcrowded housing. *Id.*; see also Glader, *supra* note 2, at 1458 (discussing disease rates, life expectancies, and injury rates of migrant farmworkers).

73. Shoemaker, *supra* note 72; Bonham, *supra* note 72.

74. *Housing Project Boon for Migrants*, GRAND FORKS HERALD (Associated Press), July 3, 1989, at 8A; Ann Bailey, *Crookston May Build Migrant Housing Project*, GRAND FORKS HERALD, May 2, 1992, at 3B.

75. Midwest Farmworker Employment & Training, Inc., formerly Minnesota Migrant Council, Inc. and North Dakota Opportunities, is located in Sauk Rapids, Minnesota. MIDWEST FARMWORKER EMPLOYMENT AND TRAINING, INC., EMPLOYMENT AND JOB TRAINING OPPORTUNITIES AND OTHER SERVICES FOR MIGRANT AND SEASONAL FARMWORKERS.

site, federal and state funding of private or public enterprises may be the best solution for migrant housing problems.<sup>76</sup>

#### D. EMPLOYEE NOTIFICATION AND PESTICIDE APPLICATION

A danger for field workers is exposure to agricultural chemicals when the pesticide is applied to the field in which the workers are working, or when the pesticide drifts into their workspace while it is being applied to an adjacent field, or when they re-enter a treated field too soon after the pesticide was applied. In response to this risk, federal regulations, administered by the Environmental Protection Agency [hereinafter EPA], provide standards for the use of pesticides when workers are present.<sup>77</sup> In addition to federal regulations, many states have adopted regulations regarding pesticide use. Minnesota has a worker protection statute concerning the use of pesticides.<sup>78</sup> Federal standards appear to be as strict or stricter than Minnesota law. While North Dakota has no specific regulations applicable to the use of pesticides and the employment of workers, the North Dakota Department of Agriculture acts as the enforcement agency for EPA regulations. Ultimately, compliance with federal law appears to be sufficient to comply with both states' law. Thus, this section will concentrate on the federal regulations and employer concerns resulting from EPA regulations since employers in both Minnesota and North Dakota generally must comply with the federal regulations.<sup>79</sup>

Under the present federal law, "[n]o owner or lessee shall permit the application of a pesticide in such a manner as to directly or through drift expose workers . . . ."<sup>80</sup> Further, agricultural employers must warn those who may be working in a field of an

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76. Although a private organization, Midwest Farmworker is funded primarily by grants from the United States Department of Labor under the Job Training Partnership Act.

Instead of waiting for the federal government or states to build migrant housing centers, perhaps one solution is to allow migrant workers to camp in local community parks which are equipped with toilets, showers, and running water. During the summer of 1992, the city of Crookston, Minnesota, allowed migrant workers to park their vehicles overnight in a city park, to sleep in their vehicles, and to use the bathrooms for \$7 per night. While this solution was better than some, it was still an imperfect solution since the park had insufficient showers and water outlets for camping. Alice Jean Mansell, former paralegal, Migrant Legal Services, 700 Minnesota Bldg., St. Paul, Minnesota (1992).

77. 40 C.F.R. § 170 (1992). Part 170 C.F.R. has been revised effective October 20, 1992. Worker Protection Standard, 57 FED. REG. 38,152 (1992) (to be codified at 40 C.F.R. § 170). The compliance dates for the revisions are April 21, 1993 and April 15, 1994. *Id.*

78. MINN. STAT. § 18B.07 (1992).

79. See 40 C.F.R. § 170.4(a) (1992) (providing that states can set and enforce more restrictive standards).

80. 40 C.F.R. § 170.3(a) (1992).

impending application.<sup>81</sup> Additionally, pending regulations would require that employers give similar notice to workers on the farm.<sup>82</sup> However, notice need not be given to a worker if the employer can assure that "the worker will not enter, work in, remain in, or pass through on foot the treated area or any area within one-fourth mile of the treated area . . . ."<sup>83</sup> Therefore, although notice of the impending application will usually be required, the employer need not mention the application to the migrant workers if the employer ensures that they stay out of the area.

Handlers<sup>84</sup> of pesticides are also subject to the pending federal regulations.<sup>85</sup> The regulations specify that handlers "shall assure that no pesticide is applied so as to contact, either directly or through drift, any worker or other person . . . ."<sup>86</sup> "Worker" is defined as "*any* person . . . who is employed . . . on *an* agricultural establishment . . . ." and "agricultural establishment" is defined as "*any* farm . . . ."<sup>87</sup>

Employers and pesticide handlers may feel confident that they have fulfilled all the statutory requirements by warning workers who are on their own property; however, there may be duties beyond those warnings which are not evident from the regulations. For example, the regulations may indicate that workers on adjacent farms must be warned of possible drift of pesticides by the handler of pesticides or by the person requesting the application of the pesticide. To what extent such warnings must be given is not clear. In the Red River Valley, the drift of pesticides may be extensive, given the Valley's wind potential. Workers who are not in the immediate area of application or who are beyond the known area of application may be exposed.

Although the pesticide regulations are extensive and expand upon previous worker protection standards, it is unclear whether a duty exists to warn workers on adjacent land if pesticides will be applied. Thus, both agricultural employers and handlers of pesticides could be required to warn workers who are working in areas

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81. 40 C.F.R. § 170.5(a) (1992).

82. 57 FED. REG. 38,156-157 (1992) (to be codified at 40 C.F.R. § 170.120(b)). These regulations come into effect in either April, 1993, or April, 1994.

83. 57 FED. REG. 38,157 (1992) (to be codified at 40 C.F.R. § 170.120(b)(3)).

84. See 57 FED. REG. 38,151 (1992) (to be codified at 40 C.F.R. § 170.3) (providing that handlers include those employed to apply pesticides).

85. 57 FED. REG. 38,161 (1992) (to be codified at 40 C.F.R. subpart C).

86. 57 FED. REG. 38,161 (1992) (to be codified at 40 C.F.R. § 170.210(a)).

87. 57 FED. REG. 38,151-52 (1992) (to be codified at 40 C.F.R. § 170.3) (emphasis added).

which are not in the immediate area of application—to what extent, however, is unknown.

A related issue concerns neighboring farmers who have incompatible simultaneous field operations. For example, one farmer may have workers in the field while a neighboring farmer wants to apply chemicals to an adjacent field. Which operation can proceed and which must be delayed? The right to proceed is especially critical to agricultural operations when timing is a pressing factor since a delayed performance may never be completed due to changes in the growing crop, weather, or pests that need to be controlled. New farming practices may resolve this basic property question. While legislation, regulation, or litigation may be considered as alternatives in finding a solution, the best may be open communication and cooperation between adjacent growers.

#### IV. UNRESOLVED ISSUES

The third category of issues for employers and migrant workers is those that have not been resolved. These unresolved issues include dispute resolution and the piece-rate/minimum wage dilemma.

##### A. DISPUTE RESOLUTION BETWEEN GROWERS AND MIGRANTS

###### 1. *Current Dispute Resolution Methods*

As in other employment relationships, disputes will arise between a grower and migrant workers. The conflicts may relate to job performance, number of hours worked, rate of pay, or numerous other considerations. In all cases, whether disputes between growers and migrant workers are resolved through negotiations or litigation, the parties should know their rights and understand whether or not they have a valid claim.

Disputes usually are resolved in one of three ways: (1) through negotiations between the employer and employee; (2) by initiating an agency procedure which will provide for an appointment of a third party who will investigate the claim and render a decision; or (3) through litigation. No matter which method is used, dispute resolution can leave one or both sides dissatisfied.

The first type of dispute resolution, negotiation, works best when the parties come to the dispute with equal bargaining power. This is not always the situation in the migrant worker context, however. In some cases, migrant workers may be intimi-

dated due to difficulties with language, fear of reprisal by other growers,<sup>88</sup> fear of immigration officials if the migrant worker is not a United States citizen,<sup>89</sup> protection of their status as a migrant,<sup>90</sup> or a result of inadequate resources to pursue a claim.<sup>91</sup> In some situations, growers may take advantage of this intimidation by settling a claim for less than the migrant worker was entitled. In other cases, migrant workers who enhance their bargaining power position through the use of inexpensive or taxpayer subsidized legal counsel might prevail.<sup>92</sup> Finally, rather than endure a time-consuming process, both parties may sacrifice some of their claims in an effort to resolve the dispute through negotiation.

The next method one can use to resolve a dispute is through agency procedures. Agency procedures can be time-consuming, whether they are initiated with a state department of labor or the United States Department of Labor.<sup>93</sup> Like litigation, agency dispute hearings require documentation. Sometimes there is insufficient information presented to determine which party's position is most accurate or which party should prevail. In an effort to be equitable, agencies may fall back on administrative procedures set up essentially to split the difference between the parties.<sup>94</sup> Consequently, an administrative resolution may not always be considered accurate or reflective of the situation between the employer and employee.

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88. See, e.g., Beverly A. Clark, *The Iowa Migrant Ombudsman Project: An Innovative Response to Farm Worker Claims*, 68 N.D. L. REV. 509 (1992) [hereinafter *Iowa Ombudsman*]. "Migrants have often attributed their reluctance to complain to a fear of reprisal or fear that their complaint would not be acted upon." *Id.* at 527.

89. Cf. Susan LaPadula Buckingham, *The DOL Fails U.S. and Foreign Laborers with New AEWL Methodology*, 4 GEO. IMMIGR. L.J. 477, 477 (1990). "Foreign workers . . . are often desperate for jobs and willing to work for substandard wages and under inhumane conditions." *Id.*

90. *Commission on Security and Cooperation in Europe/Helsinki Commission: United States Migrant Farm Workers* (CSPAN television broadcast, July 20, 1992). Roger Rosenthal, Executive Director of the Migrant Legal Advocacy Program, stated that migrants suffer from "major culture shock" from working seven days a week, like "peonage," in "statelessness" doing the "hardest work . . . in primitive living conditions." *Id.*

91. See generally Viviana Patiño, *Migrant Farm Worker Advocacy: Empowering the Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43 (1987).

92. Migrant workers in the Red River Valley and southern Minnesota can avail themselves of Migrant Legal Services [hereinafter MLS]. MLS offices are open year round in Fargo, North Dakota, and in St. Paul, Minnesota, with summer satellite offices throughout the region. Migrant Legal Services (Headquarters), 700 Minnesota Bldg., St. Paul, MN 55101. MLS is part of the Southern Minnesota Regional Legal Services, Incorporated, which in turn is part of the Legal Services Corporation.

93. In North Dakota in 1993, the average time for a wage claim determination before the State Department of Labor is twenty to twenty-eight days.

94. For example, when a migrant worker cannot prove that a quality job was performed under a contract for more than minimum wage, the enforcement agency's policy may be to award no more than the statutory minimum.

The third type of dispute resolution is litigation. Employment litigation is often time consuming and expensive, and it requires parties to accumulate substantial evidence to support their position. As a result, protracted litigation can result in expenses quite beyond the dispute at hand. For example, the time involved with litigation may cause difficulties for migrant workers, who are often transitory. On the other hand, the law authorizes an agency to assess penalties against an employer who violates an employment statute thereby possibly increasing an employer's costs.<sup>95</sup> Consequently, potential assessment of penalties may influence an employer's litigation and settlement strategy.<sup>96</sup> Thus, like an agency procedure, litigation does not assure that the parties are placed in positions similar to those in which they would have been had the dispute not arisen.

## 2. *Alternate Dispute Resolution Panel*

As an alternative to negotiation, agency resolution, or litigation, parties may want to devise a swift, yet inexpensive procedure to help parties resolve disputes. A panel of three members, such as a grower representative, a worker representative, and a neutral third party who understands migrant employment, could be the heart of such a procedure.<sup>97</sup> Assembled quickly to hear the claims of both sides in a relatively informal process, the panel could consider the evidence and decide how the dispute should be resolved. Reaction to this form of dispute resolution has been favorable. In a survey of Red River Valley farmers who employ migrant workers, sixty-one percent responded "yes" to the question of whether they would favor a panel to help resolve wage and labor disputes.<sup>98</sup>

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95. See, e.g., N.D. CENT. CODE § 34-06-19 (1987) (violating state minimum wage law is a class B misdemeanor); N.D. CENT. CODE § 34-14-09.1 (Supp. 1991) (delaying wages subjects the employer to pay interest for the unpaid wages and penalties two to three times the unpaid wages).

96. Mike Tye, Practicing Attorney at Dickel, Johansson, Taylor, Rust and Tye, Crookston, Minnesota, which represents the Red River Valley Sugar Beet Growers Association; Address at the Agricultural Employment of Migrant Laborers Regulation and Employer Compliance Workshop (Feb. 9, 1993). Court-awarded wage claims in the Red River Valley are usually settled on the basis of minimum wage paid for hours worked, regardless of the quality of work or whether there was a piece-rate agreement. *Id.* This is based on the difficulty judges have with the unequal bargaining power of the parties, dubious oral agreements, and language difficulties. *Id.*

97. See, e.g., *Iowa Ombudsman*, *supra*, note 88 at 527-35. Instead of a panel, Iowa uses an ombudsman who is both passive, waiting for disputes to come to one of six ombudsmen, and active, using outreach to seek out cases. *Id.* at 528. However effective an ombudsman, the losing party in a dispute may be likely to suspect bias if the ombudsman is not one of his own, thus undermining any final resolution to the dispute.

98. In 1993, a survey was given to growers attending workshops on migrant employment law held in Grand Forks, Fargo, and Wahpeton, North Dakota; and Wilmar, Minnesota. Agricultural Law Researcher's Survey, University of North Dakota, Central



These growers perceived that a panel offers advantages over the traditional means of resolving disputes.

Such an alternate dispute resolution method may be particularly effective for disputes that need a quick resolution,<sup>99</sup> such as in a quality of work dispute in which the migrant worker may settle too quickly or evidence may be destroyed. Alternative dispute resolution may avoid the judicial presumption that a migrant worker did not understand the terms of employment or suffered from an unequal bargaining power.<sup>100</sup>

Either growers or migrant workers could initiate an alternative dispute resolution procedure. A local panel could probably meet quickly. In a work-quality claim, for instance, the grower and migrant representative would be available to survey a field if necessary. If the panel representative was available to hear the dispute, the parties could present their evidence to the panel, and the dispute could be resolved in the same day. If the parties had already agreed to binding arbitration in a pre-hire agreement, the panel's decision would be final, at least in North Dakota.<sup>101</sup> Ultimately, a request for a panel decision could be a way for both growers and migrant workers to resolve disputes quickly and equitably.<sup>102</sup>

## B. THE PIECE-RATE—MINIMUM WAGE DILEMMA

Federal and state laws require Red River Valley employers to pay their employees a minimum wage calculated on a per hour basis.<sup>103</sup> Traditionally, agricultural employers have paid field workers, including migrant workers, on a piece-rate basis. Piece-rate basis generally means that the migrant worker is paid a certain amount per acre of land worked. Strict eight-hour days and

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Legal Research. Of the approximately 450 growers attending, 85 percent answered the question: "Would you favor a panel to help resolve wage and labor disputes in your area?" Sixty-one percent responded, "Yes." *Id.*

99. *Iowa Ombudsman, supra*, note 88 at 527. Examples of issues needing quick resolution are "transportation charges, field measurements, [and] daily time sheets . . ." *Id.* at n.137.

100. Mike Tye, *supra* note 96.

101. N.D. CENT. CODE § 32-29.2-01 (Supp. 1991). North Dakota has adopted parts of the Uniform Arbitration Act. Parties may submit a controversy to arbitration if both made a written agreement; then the arbitration will be "valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

102. The Legal Services Corporation is currently offering funding for alternate dispute resolution pilot programs between growers and migrant workers. See Availability of Funds and Requests for Migrant Alternative Dispute Resolution Proposals, 58 FED. REG. 13,109 (1993).

103. 29 U.S.C. § 206(a)(1) (1988 and Supp. 1991); MINN. STAT. § 177.23(6) (Supp. 1993); MINN. STAT. § 177.24(1)(2)(b) (Supp. 1993); N.D. ADMIN. CODE § 46-02-05-01(1) (1991); N.D. CENT. CODE § 46-02-05-02(1) (1991).

time clocks are not the norm for field workers, and a piece-rate basis offers employers the convenience of calculating wages and making a single payment when the task is completed. Thus, to comply with minimum wage laws, employers paying on a piece-rate basis must make sure that the amount paid is adequate to meet the minimum wage, given the amount of hours the migrant worker worked.

Agricultural employers who pay on a piece-rate basis have often been concerned about whether they can effectively comply with minimum wage laws. For example, employers claim that verifying employees' hourly work to comply with the minimum wage law is difficult since other duties often take them away from the field in which migrant workers are working.

Employer supervision of employees is purely a management decision that rests solely with employers. Although many employers who pay on a hourly basis must do so without the benefit of close employee supervision, employers should inform their employees of their expected performance, monitor their performance, and provide constructive feedback to their employees. This is expected of all employers; agricultural employers should be no exception.

Rather than employing workers on a piece-rate basis and then later attempting to comply with minimum wage laws, perhaps it would be more effective to pay employees based on a threshold minimum wage per hour and a threshold minimum piece-rate agreement. This payment method would benefit all parties in the employment relationship. To accomplish this, an employer and an employee could agree that wages be based on a per hour basis but that the employer would pay no less than a certain amount per piece completed. Such an agreement would give the employee an incentive to complete the tasks efficiently, triggering the piece-rate wage to be paid rather than the minimum wage per hour. This would result in the migrant worker earning a higher hourly wage. It would also minimize hourly documentation problems for the employers.

This agreement would also eliminate problems with frequency of pay laws. Initial wage payments could be based on the agreed upon per hour basis, and the final payment could be based on the outcome agreed upon. Thus, under such an agreement, employers would still be able to pay on a piece-rate basis but also comply with minimum wage law.

If frequency of pay laws become more of a factor in agricul-

tural employment relationships,<sup>104</sup> employers may have difficulty determining what amount to pay migrant workers when the task is not yet finished. For example, if a field worker works eighty hours in a two-week period and completes one-half of the agreed upon task in that time, an employer may not know what amount to pay—the amount based on the minimum wage for the hours worked for that period or an amount based on the percentage of the task completed. If the former is chosen, the employer may be wrongly withholding pay that is technically due to the worker.

Communication between the employer and employee at the initiation of the employment relationship appears to be the best method of minimizing potential disputes arising from the minimum wage/piece-rate dilemma. Employers must pay at least minimum wage to comply with established law. Beyond that, parties can determine what is expected of them by signing an employment statement or agreement so neither party to the employment relationship has false expectations.

### C. PAYING EACH EMPLOYEE

A substantial portion of the migrant workers in the Red River Valley are families that work as a group. As a result, the employer may question whether it can pay the crew leader or head of the family, with the expectation that the payee will distribute the wages among the workers. To ensure that growers are meeting their obligations, they may want to pay each worker individually even though federal law permits the grower to pay crew leaders who are registered farm labor contractors.<sup>105</sup> Once paid, the crew leaders then distribute the pay to their workers. However, there are only a few registered crew leaders in the Red River Valley.<sup>106</sup> Under MSAWPA, the head of the family is exempted from crew leader requirements and thus may receive and distribute the family's pay.<sup>107</sup> Therefore, growers who pay the head of the family do not violate federal law. However, the definition of family is relatively narrow.<sup>108</sup> For example, a cousin is not considered a family member for purposes of the statute, yet a cousin may be consid-

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104. See Frequency of Pay *supra* notes 47-52 and accompanying text.

105. 29 U.S.C. § 1802(7) (1988).

106. See *supra* note 2 (conveying that few migrant workers are independent contractors).

107. 29 C.F.R. § 500.20(l) (1992).

108. See 29 C.F.R. § 500.20(o) (1992) (defining "*Immediate family* [as] a spouse; . . . [c]hildren, stepchildren, and foster children; . . . [p]arents, stepparents, and foster parents; and . . . [b]rothers and sisters.").

ered the head of a family by the family members. Consequently, growers would violate 29 U.S.C. § 1803 by paying a family's wages to a head of the family who is a cousin. This is another example of the complexity of a simple regulation. Thus, growers should not only inquire as to who is the head of the family; they must ascertain if the head of the family falls within the category prescribed by law.

Despite the opportunity to pay the head of a family, growers should also consider paying each worker. Individual pay checks simplify the process of computing and withholding mandatory FICA and other federal taxes.<sup>109</sup> Individual payment also enhances the likelihood that the worker's withholdings are correctly reported to the Internal Revenue Service.

In addition to better record keeping for the government, the grower's record keeping is facilitated by individual pay checks because they allow the grower to obtain a signed receipt from each worker. These receipts avoid the problems that arise when members of the group claim that they have not been paid by the group's leader and request payment directly from the grower. In such a situation, the grower may end up paying twice for the labor: once to the group's leader, and a second time to the individual worker. Individually paying each worker and having the worker sign a receipt addresses three challenges. These challenges include the narrow definition of head of the family, the grower's need to ascertain the familial relationship of the head of the family, and the grower's need to document payment to each individual separately. The exception in MSAWPA which permits growers to pay the head of a family should not be relied on and perhaps is of limited value as a law.

## V. CONCLUSION

Agriculture's need for migrant workers will not disappear in the foreseeable future. The skills and dedication of migrant workers and the economics of part-time labor will likely continue to be a valuable resource in the production of many labor-intensive crops. Farm operators employing migrant workers should expect to use many of the same labor management skills followed in other employment settings.

A major component of any solution to employment challenges is communication among employers, workers, enforcement per-

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109. See, e.g., 26 U.S.C. § 3121(a)(8) (1988).

sonnel, and policy makers. Sharing ideas, listening, identifying points of agreement, setting goals that do not conflict, discussing differences, considering alternatives, and coordinating efforts will lead to communication that produces effective results.

The various state and federal programs addressing migrant employees usually are intended to protect the workers. Most employers understand and accept this intent, but they grow frustrated when the legal expectations are unclear or are more burdensome than necessary to fulfill the purpose of the law. One alternative to ease the challenge of complying with numerous state and federal requirements is to coordinate the jurisdictions' statutes and regulations. For example, if a single definition could be agreed upon for determining whether a small employer is exempt from paying minimum wage, from safety and health standards, and from unemployment taxes, it would enhance employer understanding and compliance.

Likewise, migrant workers who work in several states during a growing season also would benefit from closer coordination among jurisdictions. For example, they would have a better understanding of their rights and obligations under the work agreement as well as what is expected of their employers. Migrant workers would not have to familiarize themselves with different rules for each jurisdiction in which they are employed. In addition, compliance is eased for employers without diminishing worker protection, the cost of regulatory compliance will decrease, and employers may be less inclined to replace labor with other production technology, thus preserving the workers' jobs.

Employers often struggle to comply with some requirements, not because the employer does not want to comply, but because the requirements are difficult to fulfill. For example, being asked to indicate a temporary worker's future earnings with "reasonable certainty" is difficult in most cases. Providing this information is even more difficult for employers of field workers because of uncontrollable factors, such as growing conditions and weather which dramatically influence the availability of work.

Expecting or requiring employers to pay wages monthly or more frequently should ease the task of reporting workers' wages. Such improvements would not only ease the burden for employers but also benefit employees, because employers would better understand what is expected of them and would be more willing to comply with sensible expectations. The challenge is to merge the goal of the law with what employers can feasibly accomplish.

Even though growers may pay their workers through a group leader or head of the family, employers should be encouraged to individually pay each worker. Such a practice facilitates proper withholding and reporting of taxes and protects the employer from having to pay workers if the group leader does not deliver their wages.

Some unanswered questions or unresolved issues need further thought and possibly action by the legislative or executive branches of government. Perhaps one of the toughest issues to resolve in the future concerns the application of pesticides by adjacent farm operators while employees are working in a neighboring field. This issue needs to be resolved, maybe with legislation, regulation, or an emerging common business practice.

Growers who employ migrant agricultural workers face challenges in complying with various federal and state employment laws. Some challenges can be resolved by modifying management practices. Other challenges deserve the attention of legislatures, Congress, and administrative agencies. Attention to these matters will enhance the opportunity for profitable agriculture and fulfilling employment.

